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No. 260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

MADELINE BUCHANAN, CLAYTON A. BUNTING, BYARD V. CARMEAN, et al.,
Petitioners

v.

BRENDA EVANS, an Infant, by Charles Evans, Her Guardian ad litem; OKLYN BROWN, JR., an Infant, by Oklyn Brown, His Guardian ad litem; MARY ANN EVANS, an Infant, by Helen Evans, Her Guardian ad litem; et al.,
Respondents

And six consolidated cases.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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And six consolidated cases.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in each of these cases on May 28, 1958.

The cases below involved seven suits brought by various Negro minor children to secure admission to schools in seven different school districts in Delaware. For purposes of brevity, only the first of these cases is listed in the caption to this case. The remaining cases are:

Madeline Buchanan, *et al., Petitioners*

v.

Madeline Staten, *et al., Respondents*
Madeline Buchanan, *et al., Petitioners*

v.

Julie Coverdale, *et al., Respondents*
Madeline Buchanan, *et al., Petitioners*
v.
Yvonne Holloman, *et al., Respondents*
Madeline Buchanan, *et al., Petitioners*
v.
David Creighton, *et al., Respondents*
Madeline Buchanan, *et al., Petitioners*
v.
Marvin Denson, *et al., Respondents*
Madeline Buchanan, *et al., Petitioners*
v.
Thomas J. Oliver, Jr., *et al., Respondents*

The cases were consolidated both in the District Court and in the Court of Appeals for the Third Circuit. They were briefed and argued together. The decision in the Third Circuit was the decision in all cases and, at this time, the State Board of Education is seeking a petition for the writ of certiorari in all of these cases.

CITATIONS TO OPINIONS BELOW

The first opinion of the District Court, (R.SB p. 15a-19a)* which was upon the motion of the present respondents in Case No..... in this Court, printed in Appendix hereto, page 1a, is reported in 145 F. Supp. 873. The second decision of the District Court in the same case, printed in Appendix hereto, page 6a, is reported in 149 F. Supp. 376. The third opinion of the District Court, printed in Appendix hereto, page 10a, is reported at 152 F. Supp. 886. The opinion of the Court of Appeals, which is in the Record and

* Hereafter "R.SB" refers to that part of the record which is the appendix of the State Board's brief in the Court of Appeals. "R.PA" refers to appendix to plaintiff's brief.

is printed in Appendix p. 15a hereto, is reported in ..... F. 2d .....

JURISDICTION

The judgment of the Court of Appeals was entered on May 28, 1958 and is a part of the record. Rehearing was denied on June 20, 1958. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether a United States Court can, in furtherance of certain civil rights of the respondents guaranteed by the United States Constitution, alter the organization of the administration of education in Delaware and interpret the education administration statutes of Delaware and increase or decrease the responsibility and authority of the various school boards contrary to the law of Delaware.

2. Whether the Court of Appeals properly determined the responsibility of the Delaware State Board of education to draw plans of desegregation of Delaware schools.

STATUTES INVOLVED

The statutes involved are those of Title 14 of the Delaware Code. No one statute is in issue but all of those which go to the administration of Delaware schools. These statutes are set out at length in the Record and are specifically, Title 14, Delaware Code, Sections 101, 105, 107, 108, 121, 122, 141, 301, 302, 305, 505, 702, 741, 742, 746, 902, 941, 944, 976, 1401, 1410. (R.SB, p. 32a)

BASIS FOR FEDERAL JURISDICTION

Jurisdiction in the Court originally was invoked under 28 U. S. C. §1343 and §1331. The District Court, Wright J.,

(Appendix, p. 1a) considered jurisdiction under each section and determined that, since jurisdiction existed under 28 U. S. C. §1343, it was unnecessary to determine whether the jurisdiction also existed under 28 U. S. C. §1331.

STATEMENT OF THE CASE.

After the United States Supreme Court decision in *Brown v. Board of Education of Topeka*, 347 U. S. 483, 74 S. Ct. 686 (1954), the State Board of Education of Delaware promptly moved to comply with that decision. Regulations were instituted requiring local boards to submit plans for desegregation to the State Board. In many school districts there was prompt compliance. The State Board approved the plans submitted, and by 1956 over one-half of the State's population was living in areas with desegregated schools.

In many areas, however, the local boards failed to submit, or refused to submit, plans for desegregation. In these areas, when Negro students demanded admission to segregated schools, the State Board was forced to answer that such admission could not be granted by the State Board alone.

On May 2, 1956, seven actions were filed in the Federal District Court for the District of Delaware. In each action Negro students who were residents of one of Delaware's segregated school districts, filed suit against the members of the State Board of Education, the State Superintendent of Public Instruction, and the members of the local school district board for the district in which they lived. The prayer for relief in each case was that the various rules, regulations, laws, etc., by which segregation was maintained be declared unconstitutional and that the Court issue an injunction requiring the defendants to admit, on a racially non-discriminatory basis, the plaintiffs and others similarly

situated to the school within the district of the defendant local board.

In one of the present actions, defendant local board members moved to dismiss as to them. In *Brenda Evans et al. v. Members of the State Board of Education, et al.*, 145 F. Supp. 873 (D. C. Del., 1956), Judge Wright ruled that the local board was properly a defendant in the action, that the local boards are a legislative creation of the State of Delaware, that the rules and regulations of the State Board have the force and effect of law and that the State Board had requested of local boards that they prepare a plan of desegregation.

The other six local boards answered the complaints in an essentially similar manner; in each case alleging overcrowding in the "white" schools in the local district and alleging that all communities in Delaware south of Dover are substantially a single community; that they should be integrated as a whole and that the local boards are not competent to deal with the problem. In each case, the plaintiffs moved to strike the "single community" defense. The matter was extensively briefed by the defendant local boards and by the plaintiffs. The Court has not ruled on this motion.

On January 21, 1957, the plaintiffs in one of the present actions filed a motion for summary judgment against all of the defendants. In *Evans et al. v. State Board et al.*, 149 F. Supp. 376 (D. C. Del., 1957), Chief Judge Leahy made findings of fact that the State Board, immediately after the First Brown decision, made regulations calling for desegregation plans from local boards and that the State Board made several attempts to get these plans from the local boards. The Court further found that the local board refused to act, and that, even assuming the local board only

acts in an advisory capacity, nevertheless, since the State Board has charged the local boards with the duty to submit a plan, both boards are properly before the Court. The Court proceeded to find that while the State Board was attempting to secure desegregation, the local board was making no prompt or reasonable start toward desegregation. Judge Leahy noted the State Board's suggestion that the plan be submitted by the local board directly to the Court; however, the Court ruled that such procedure did not seem to be necessary at that time. The local board was ordered to submit a plan of desegregation to the State Board within 30 days and the State Board to submit its plan to the Court within 60 days.

Defendant Local Board of Clayton School District took an appeal from this order. The appeal was never prosecuted and on July 5, 1957, the record on appeal was returned to the District Court. The Clayton Board has not complied with the order.

On June 25, 1957, plaintiffs in all actions moved to consolidate the actions and moved for summary judgment against the State Board of Education and the State Superintendent of Public Instruction asking that these defendants be required to submit to the Court a plan of desegregation providing for admittance of Negro students at the beginning of the next school term in all public school districts of the State of Delaware which heretofore have not admitted Negroes under plans of desegregation approved by the State Board. No evidence was taken, nor were affidavits filed. The Plaintiffs submitted briefs arguing that the plaintiffs had been unable to get their rights to desegregated education from the local boards and noting generally the refusal of the defendant local boards to cooperate with the State Board. The State Board filed a brief urging that

no reason had been shown for varying the ruling previously made by the Court that the local boards must submit plans to the State Board.

On July 15, 1957, the Court issued a Memorandum and Order, printed in Appendix, page 10a, reported in 152 F. Supp. 886, making certain findings of fact and law and ordering the State Board to restrain from refusing admission of Negro plaintiffs and all other children similarly situated to the public school in the named school districts, and further, to submit to the Court within 60 days, a plan of desegregation providing for the admittance for the Fall term of 1957, of Negro students in all public school districts which heretofore have not admitted Negroes under a plan of desegregation approved by the State Board.

The Court then ruled that to further "obtain and effectuate" admittance to school in the seven named districts and "defendant Members of the State Board of Education, having general control and supervision of the public schools of the State of Delaware and having the duty to maintain a uniform, equal, and effective system of public schools throughout the State of Delaware," and the State Superintendent are ordered to submit a plan for the "admittance, enrollment and education on a racially nondiscriminatory basis, for the Fall term of 1957" of all segregated school districts in Delaware.

The State Board of Education and the State Superintendent of Public Instruction took an appeal from this order on August 7, 1957.

The opinion from the Third Circuit, by Chief Judge Biggs, was delivered on May 28, 1958. Therein, it was ruled that the rights of the respondents are paramount, that this Court has ruled upon the rights of the Negro children, that

the State Board has the authority to adopt a plan of desegregation, and that the Court would not assume that the local boards would not follow the plan.

The petitioners' motion for reargument was denied on June 20, 1958, and the mandate was sent to the lower court on June 30, 1958.

REASONS FOR GRANTING THE WRIT

It seems beyond question that the local boards must be a party to any suit to gain admission to a school in Delaware. Such is the opinion of the District Court in the first of three opinions concerning these cases, arising on a motion by one of the Boards to dismiss as to it. *Brenda Evans, et al., v. State Board,* 145 F. Supp. 873. Appendix 1a. Judge Wright said:

> "The local school boards are a legislative creation of the State of Delaware. The State Board of Education has determined as a matter of general policy (1) 'that any steps toward integration must be embodied in a plan to be devised by the local board,' and (2) 'that any such plan must be submitted to the State Board for consideration and approval.' Regulations of the State Board of Education have the force and effect of law. A plan of integration cannot be formulated by the defendants as individuals. Any action taken by the individual defendants relative to the integration problems of Clayton School District No. 119 is possible only because by virtue of State law they are the duly and legally constituted Board of Trustees of the Clayton School District. Thus, the defendants' alleged failure to formulate a plan for integration must be considered to be done under color of State law." (Appendix, p. 5a)

On a motion for summary judgment against the local and State boards, the District Court again ruled that, under the Delaware law, the local board must submit a plan to the

State Board before the State Board would be required to submit a plan to the Court. *Brenda Evans, et al., v. State Board, et al.,* 149 F. Supp. 376. Appendix, p. 6a. Judge Leahy said:

> "[1] The Local Board answers on several grounds. They contend they are improper parties to this action since they are not vested with the power to make or determine educational policy, but function only in advisory capacity, and this power can not be delegated by the State Board or altered by orders originating therein. However, the mere fact the Local Board is required only to recommend educational policy does not make the Local Board an improper party to this action. The State Board having charged the Local Board with the duty to submit a plan for desegregation, both boards are now properly before the Court. (Appendix, p. 7a-8a)
>
> "Summary judgment is granted and an order should be submitted directing the Board of Trustees of the Clayton School District No. 119 to submit a plan for the integration of the public school to the State Board of Education, in accordance with their existing rules and regulations. Such plan by the Local Board shall be submitted to the State Board within a period of 30 days. Within 60 days, the State Board of Education shall submit its plan to the Court for further instructions." (Appendix, p. 9a).

The reason for these two opinions is found in the curious nature of the Delaware school system. Administrative and policy making is divided between the State and local boards.

One of the areas in which decision making and the execution of the decision is divided between local boards and the State Board is necessarily the area presently in issue. The Supreme Court of Delaware has given what must be con-

sidered the only authoritative statement as to the relationship between the State and local boards in Delaware.

This statement was made in *Stiener v. Simmons*, ... Del. ....., 111 A. 2d 574 (1955), at page 582:

> "No attempt is made by the State Board to force immediate desegregation upon any local board. Joint action is required. The somewhat loosely-knit educational system of the State, with administrative and policy making powers divided between state and local authorities, and the system of elective local boards prevailing in Kent and Sussex Counties (and in a few districts in New Castle County), obviously make such joint action advisable—if not, indeed, necessary."

In the *Stiener* case, as in the very case now before the Supreme Court, the question was not one of desegregation but rather of how desegregation was to be administered under the Delaware school organization. It is this question which the Delaware Supreme Court concluded could only be answered by bringing before the Court both the State and the local boards. The issue was not before the Delaware Court precisely because only the local board had acted, and the Delaware Court found that the action was invalid because the local board had failed to submit its plan to the State Board before proceeding to attempt to integrate schools in Milford, Delaware. On this basis alone, the Delaware Court ruled improper the action of the local board and, at that point, proceeded to state that "joint action" is certainly advisable and very likely "necessary."

It cannot be emphasized too strongly by the State Board that the question now before the Court, the question before the Court of Appeals below, and the question finally decided by the District Court is not one of desegregation at all. The entire record and history of this case, from its initia-

tion, indicates that the State Board at no time has questioned the right of the Negro children to attend desegregated schools. Only the local boards have actually fought the principles of desegregation. The State Board has sought only to secure the assistance of the Court in requiring the local boards to cooperate with it in securing desegregation to the respondents in these cases. In seeking to do so, the State Board has, at least at the beginning, been in agreement with the respondents in these cases themselves who actually joined the local boards and each member of the local boards in these actions, and also in the District Court itself which declines to strike the local boards from the action in the first opinion in the District Court (Appendix, p. 1a) and, in the second decision in the District Court, actually ordered the local board to proceed to supply a plan of desegregation to the State Board before the State Board would be required to submit the plan to the District Court (Appendix, p. 6a). The action of the District Court has the approval of the Court of Appeals in the District Court's first case (Appendix, p. 15a) and the action of the District Court in the second decision is neither approved nor disapproved by the Court of Appeals. A reading of the third decision in the District Court, *Brenda Evans, et al., v. State Board, et al.*, 152 F. Supp. 886, and the decision of the Court of Appeals for the Third Circuit, *Brenda Evans, et al., v. State Board, et al.*, ... F. 2d ....., Appendix, p. 15a, indicates that it is not an analysis of Delaware law concerning school organization which impelled these courts to rest the burden solely upon the State Board of Education; but rather, it is a determination to get on with the job apparently regardless of whose responsibility it would be found to be under a precise analysis of the State laws and Delaware case decisions. The third opinion in the District Court even while ordering the State

Board to proceed above, observed that it was not solely the responsibility of the State Board. Appendix, p. 11a.

It is submitted that it is of vital importance on a national basis that the Supreme Court should determine at this time whether the Federal Courts may, in order to expedite the administration of the constitutional rights of Negro children, change the actual organization and hierarchy of responsibility in a state school system in order to secure more promptly those rights. It is readily agreed by the State Board that, if the order of the Court of Appeals and the District Court were carried out successfully, it would substantially expedite the securing of the rights in question to the Negro children. However, these cases do not involve a simple question of form alone, but rather a matter of vital importance to the state of Delaware. The order of the Court in this case is the first instance to the knowledge of the State Board in which a State Board of Education alone has been directed to act as opposed to a direction running to a local board of education. Although the Circuit Court and the District Court have spoken in terms of the "paramount authority" of the State Board, nevertheless, a reading of the statutes indicates that actually the authority which the State Board may exercise over a recalcitrant local board is in fact illusory. The members of the local board are elected by the residents of the local board district and are controlled in no way by the members of the State Board. The local boards can in the future, as they have in the past, disregard, with impunity, instructions from the State Board. The fact that the local boards in question have refused or failed to submit plans of desegregation to the State Board even under a court order to do so (Appendix, p. 6a) conclusively proves this point. The State Board is sincerely concerned about the welfare of the school system of Delaware and is extremely appre-

hensive of the plan of relieving the members of local school boards of any responsibility for the implementation of desegregation. Sound sociological and practical considerations demand that the local boards be not permitted to claim complete abnegation of responsibility for the plan of desegregation put into effect in their districts.

It must be noted that the third opinion of the District Court and the opinion of the Court of Appeals did not specifically overrule, nor declare unconstitutional, any of the statutes concerning the Delaware school system except that part requiring segregation nor any Delaware cases concerning the organization of the Delaware school system. However, such failure can only be noted as an attempt to avoid the problem rather than to solve it. The highest court of Delaware, the Delaware statutes and the first two opinions of the District Court of Delaware correctly placed the local boards precisely in the cases and equally responsible with the State Board. It is submitted that the Supreme Court of the United States should settle the question at this time whether Federal courts, in order to expedite civil rights, may even tacitly, as in this case, alter the organization of a school system and shift responsibility from where it is placed by State statute and judicial determination before such Federal courts even attempt to use the existing administrative structure of the State system.

CONCLUSION

It cannot be emphasized too strongly that the present question is not one of desegregation. The State Board has never raised that question and does not do so now. The sole question is one of implementation of desegregation and whether the Federal courts may alter the effect of state laws

of school administration and responsibility. It is submitted that this question is of great significance at the present time and will be increasingly so within the coming years. This petition for certiorari should be granted.

Respectfully submitted,

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FRANK O'DONNELL, JR.,
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F. ALTON TYBOUT,
Deputy Attorney General

OPINION OF JUDGE WRIGHT IN BRENDA EVANS, ET AL. v. MEMBERS OF THE STATE BOARD OF EDUCATION, STATE SUPERINTENDENT OF PUBLIC INSTRUCTION, MEMBERS OF THE BOARD OF TRUSTEES OF CLAYTON SCHOOL DISTRICT NO. 119.*

WRIGHT, *District Judge.*

This is a class suit brought pursuant to Rule 23(a) (3) of the Federal Rules of Civil Procedure, 28 U. S. C.[1] All of the plaintiffs are among those classified as "colored", of Negro blood and ancestry, and are residents of Clayton, Delaware. The defendants are the members of the State Board of Education, the Board of Trustees of Clayton School District No. 119 and the State Superintendent of Public Instruction.

The complaint alleges plaintiffs "* * * by reason of their residence, except for their race, color and ancestry, would be acceptable by defendants for attendance at the public school in Clayton School District No. 119."[2] The complaint further charges that in response to a petition addressed to the defendants, as members of the Board of Trustees of the Clayton School District No. 119, "* * * to take immediate steps to reorganize the public school * * * on a racially nondiscriminatory basis and to eliminate racial segregation in said school,"[3] said defendants officially stated they had no plan for desegregation.[4] The failure and

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* Opinion handed down November 9, 1956 reported in 145 F. Supp. 873.

1. "Rule 23. * * * (a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

* * *

"(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

2. Par. 3 of the Complaint.

3. Par. 5 of the Complaint.

4. Par. 6 of the Complaint

refusal of the Board of Trustees of the Clayton School District to reorganize the public school of the school district on a racially nondiscriminatory basis was called to the attention of the defendant members of the State Board of Education, who were requested to immediately desegregate the public school.[5] On March 15, 1956 the defendant members of the State Board of Education, by official action, unanimously refused to comply with the plaintiffs' request to desegregate said public school.[6]

Some of the defendants, namely, the members of the Board of Trustees of Clayton School District No. 119, have moved to dismiss the complaint as to them on the grounds, (1) the complaint fails to state a claim against the defendants upon which relief can be granted, and (2) this court lacks jurisdiction over the subject matter.

[1-3] The defendants urge the complaint fails to state a claim upon which relief can be granted because there is absent any allegation of the non-existence of administrative impediments to full faith compliance with the constitutional principles set forth by the Supreme Court in the two *Brown* decisions.[7] Omission of this allegation is fatal, according to defendants, because they read the second *Brown* decision as conditioning the right of a Negro to attend a public school without regard to racial considerations.

Defendants misapprehend the meaning of the two *Brown* decisions. The first *Brown* decision supplied an unqualified affirmative answer to the question of whether "segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of a minority group of equal educational opportunities".[8] The

5. Par. 7 of the Complaint.

6. Par 8 of the Complaint.

7. Brown v. Board of Education of Topeka, 1954, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873, hereinafter referred to as the first Brown case; Brown v. Board of Education of Topeka, 1955, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083, hereinafter referred to as the second Brown decision.

8. 1954, 347 U. S. 483, at page 495, 74 S. Ct. at page 691.

Supreme Court expressed its holding in the following manner:

> "* * * we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."[9]

In the second *Brown* decision, the Supreme Court referred to the first *Brown* case as a declaration of "the fundamental principle that racial discrimination in public education is unconstitutional".[10] After incorporating the opinion in the first *Brown* decision by reference into the opinion of the second *Brown* decision, the Supreme Court indicated the subject matter of the second opinion was to determine "the manner in which the relief is to be accorded."[11] Therefore, the second *Brown* decision cannot be construed as conditioning the constitutional right set forth in the first *Brown* case. Rather, the second *Brown* decision must be read as establishing a standard as to what constitutes a good faith implementation of the governing constitutional principles set forth in the first *Brown* decision. Not only do the constitutional principles set forth in the first *Brown* decision remain unqualified, but, the defendants also have the burden of advancing reasons justifying delay in carrying out the Supreme Court ruling.[12] It would be illogical

9. Id., 347 U. S. at page 495, 74 S. Ct. at page 692.
10. 1955, 349 U. S. 294, at page 298, 75 S. Ct. at page 755.
11. Ibid.
12. "* * * the [inferior] courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. *The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date.* To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems." (Emphasis added.) Brown v. Board of Education of Topeka, 1955, 349 U. S. 294, at pages 300-301, 75 S. Ct. 753, at page 756, 99 L. Ed. 1083.

to hold plaintiffs' complaint must set forth facts which defendants will have the burden of proving.

[4, 5] The second objection of defendants goes to the jurisdiction of this court over the subject matter of the complaint. Jurisdiction is founded upon 28 U. S. C. §§ 1331 and 1343. 28 U. S. C. § 1331 provides:

> "§ 1331. Federal question; amount in controversy
>
> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States. June 25, 1948, c. 646, 62 Stat. 930."

The pertinent portion of 28 U. S. C. § 1343 provides:

> "§ 1343. Civil rights
>
> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> • • •
>
> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. June 25, 1948, c. 646, 62 Stat. 932."

The jurisdiction of this court, invoked under the civil rights jurisdictional statute, 28 U. S. C. § 1343, is questioned by the defendants on the theory that when the Board of Trustees of Clayton School District No. 119 officially stated they had no plan for desegregation they were not acting "under color of any State law". This conclusion is unsound and can only be reached by traveling a tortuous path of conceptualistic reasoning.

The local school boards are a legislative creation of the State of Delaware.[13] The State Board of Education has determined as a matter of general policy (1) "that any steps toward integration must be embodied in a plan to be devised by the local board", and (2), "that any such plan must be submitted to the State Board for consideration and approval".[14] Regulations of the State Board of Education have the force and effect of law.[15] A plan of integration cannot be formulated by the defendants as individuals. Any action taken by the individual defendants relative to the integration problems of Clayton School District No. 119 is possible only because by virtue of State law they are the duly and legally constituted Board of Trustees of the Clayton School District. Thus the defendants' alleged failure to formulate a plan for integration must be considered to be done under color of State law.[16]

Since the court has jurisdiction under 28 U. S. C. § 1343, it is unnecessary to determine whether the court would have jurisdiction under 28 U. S. C. § 1331. Accordingly, that question is left undecided. The defendants' motion to dismiss is denied.

An order in accordance herewith may be submitted.

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13. 14 Del. C.

14. Steiner v. Simmons, Del. 1955, 111 A. 2d 574, at page 582.

15. Id., 111 A. 2d at page 583.

16. Cf. Ex parte Commonwealth of Virginia, 1879, 100 U. S. 339, at page 347, 25 L. Ed. 676: "Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State."

In Iowa-Des Moines National Bank v. Bennett, 1931, 284 U. S. 239, at page 246, 52 S. Ct. 133, at page 136, 76 L. Ed. 265, it was said: "When a state official, acting under color of state authority, invades, in the course of his duties, a private right secured by the Federal Constitution, that right is violated, even if the state officer not only exceeded his authority but disregarded special commands of the state law."

Finally, it has been stated, "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." United States v. Classic, 1941, 313 U. S. 299, at page 326, 61 S. Ct. 1031, at page 1043, 85 L. Ed. 1368.

OPINION OF JUDGE LEAHY IN BRENDA EVANS ET AL., PLAINTIFFS, v. MEMBERS OF THE STATE BOARD OF EDUCATION, STATE SUPERINTENDENT OF PUBLIC INSTRUCTION, MEMBERS OF THE BOARD OF TRUSTEES OF CLAYTON SCHOOL DISTRICT NO. 119, DEFENDANTS.

Civ. A. No. 1816.

March 6, 1957.

LEAHY, *Chief Judge*.

This cause arises on plaintiffs' motion for summary judgment. A motion to dismiss was denied in D. C. Del., 145 F. Supp. 873. The material facts essential to this motion present no genuine issue. Plaintiffs are of Negro ancestry, citizens of the United States and of the State of Delaware, residing in the community known as Clayton, in Kent County.[1] Plaintiffs have not been accepted in the public school under the jurisdiction of Clayton School District No. 119,[2] nor has the school district heretofore taken as students persons of Negro ancestry.[3] After the first *Brown* decision by the Supreme Court on May 17, 1954,[4] the State Board of Education adopted on June 11, 1954, certain regulations calling on the local districts for proposed plans for desegregation to be submitted for review. On August 19, 1954, and again on August 26, the State Board requested all schools should present a tentative plan for desegregation on or before October 1, 1954. On May 31, 1955, the Supreme

1. Complaint, par. 3 and Affidavits; Answer, Members of State Board of Education hereinafter referred to as State Board and State Superintendent of Public Instruction hereinafter referred to as State Superintendent, par. 3.

2. Complaint, par. 3; Answer, State Board and State Superintendent, par. 3.

3. Complaint, par. 8; Answer, State Board and State Superintendent, par. 6.

4. Brown v. Board of Education of Topeka, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873.

Court came down with the second *Brown* decision.[5] On August 10, 1955, members of the Board of Trustees of Clayton School District No. 119 were petitioned to take immediate steps to eliminate racial segregation in its public school.[6] By letter of February 10, 1956, the State Board was apprised of the failure of the Clayton School to desegregate and was requested to do so.[7] The State Board, by letter of March 16, 1956, made known it could not comply with immediate desegregation absent joint action initiated by the Local Board.[8] The members of the Local Board "admit that they have as yet arrived at no plan for desegregation of the Clayton School and that there is proposed no reorganization thereof."[9]

Plaintiffs' prayer for relief is in the alternative: 1. That this Court issue interlocutory and permanent injunctions ordering defendants to admit infant plaintiffs and all others similarly situated to the public school in Clayton School District No. 119 on a racially nondiscriminatory basis, or 2. That the Local Board be required to submit to the State Board of Education a plan for integration of that school providing for admittance not later than the school term begining in September, 1957.

[1] The Local Board answers on several grounds. They contend they are improper parties to this action since they are not vested with the power to make or determine educational policy, but function only in advisory capacity, and this power can not be delegated by the State Board or altered by orders originating therein. However, the mere fact the Local Board is required only to recommend educational policy does not make the Local Board an improper

5. Brown v. Board of Education of Topeka, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083.

6. Complaint, par. 5; Answer, Board of Trustees of Clayton School District No. 119 hereinafter referred to as Local Board, par. 5.

7. Complaint, par. 7; Answer, State Board and State Superintendent, par. 7.

8. Complaint, par. 8; Answer, State Board and State Superintendent, par. 8.

9. Complaint, par. 6; Answer, Local Board, par. 6.

party to this action. The State Board having charged the Local Board with the duty to submit a plan for desegregation, both boards are now properly before the Court.

[2] Defendant Local Board alleges "that at no time has a person of negro blood or ancestry been denied admission to the Clayton School." After the refusal of the Local Board to grant the petition of plaintiffs requesting desegregation, it would be hollow formality to require them literally to knock on the schoolhouse door.[10]

[3] The remainder of defendant Local Board's contentions relate to the propriety of granting relief at this time. The Local Board alleges if the relief requested by plaintiffs is granted now, "it will constitute a violation of the mandate of the Supreme Court of the United States, requiring the elapse of a reasonable time for the transition of segregated schools to non-segregated schools." It is further alleged the load of administrative work involved, the lack of facilities or transportation, and the inadequacy of personnel and school space prevents the Clayton School from being presently operated on a non-segregated basis. Finally, it is alleged the sudden change which would occur in the present social make-up of the Clayton School District would do great damage to eventual integration. But matters of defense dealing with administrative problems are, at this time, prematurely raised by the Local Board.[11] The issue here is whether or not "a prompt and reasonable start toward full compliance" has been made. Despite the fact that on May 17, on August 19, and on August 26, 1954,

10. See the opinion of Chief Judge Parker in Charlottesville School Board v. Allen, 4 Cir., 240 F. 2d 59.

11. In the second *Brown* decision laying the blueprint for integration, the Supreme Court indicated the procedure to be followed: "* * * the [inferior] courts will require that the defendants make *a prompt and reasonable start toward full compliance* with our May 17, 1954, ruling. *Once such a start has been made, the courts may find that additional time is necessary* to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date." (Emphasis mine.) Brown v. Board of Education, 349 U. S. 294, 300-301, 75 S. Ct. 753, 756.

the State Board requested local boards to present plans on or before October 1 of that year for the integration of the public schools, no plan of any kind has been forthcoming by the Clayton School Board. And, although expressions of community dissent may stay racial desegregation for a reasonable time in order to meet local problems through good faith implementation, they can never become an instrument to color interminably the governing constitutional principles as declared by the Supreme Court. Here, there has been no prompt and reasonable start.

[4] The State Board of Education argues that if the Clayton Board of Trustees is required to present a plan for integration, it should be filed with this Court directly and not with the State Board. It argues the prime responsibility for formulating a plan belongs to the Local Board, that since the rules of the State Board contemplate voluntary submission of these plans, the effect of the present litigation is to hold the Local Board answerable to this Court; and that otherwise the State Board would be placed in a difficult and unsatisfactory position resulting in harm both to it and the entire school system. The State Board would thus be content to submit its views to this Court when requested to do so. However, while the Board may require the local boards to cope with local problems in the first instance, it should not remove itself directly from the scene because a litigant has sought the judicial arm to secure his rights. At this point in time, I see no reason for not following the usual practice set out by the State Board itself in its published rules and regulations.

Summary judgment is granted and an order should be submitted directing the Board of Trustees of the Clayton School District No. 119 to submit a plan for the integration of the public school to the State Board of Education, in accordance with their existing rules and regulations. Such plan by the Local Board shall be submitted to the State Board within a period of 30 days. Within 60 days, the State Board of Education shall submit its plan to the Court for further instructions.

MEMORANDUM AND ORDER.

(Entered July 15, 1957.)

(In All Appeals.)

1. Among the several motions before the Court are plaintiffs' motion for consolidation of C. A. Nos. 1816 through 1822, inclusive under FR 42(a), and plaintiffs' motion for summary judgment against the Members of the State Board of Education and the State Superintendent of Public Instruction under FR 56(a).

2. This Court disposed of a previous motion of plaintiffs for summary judgment with respect to C. A. No. 1816,[1] as to which an appeal was taken to the Court of Appeals for this Circuit but not legally prosecuted by the Local Board, in accordance with law and the Rules of said Court of Appeals. The time for filing a plan as to this particular school district, as provided for in the order entered by the Delaware District Court was continued, pending the appeal, until further order of this Court. The present order will be operative as to this Local Board for its failure to perfect its appeal.

3. Answers of defendant State Board and State Superintendent in all the Civil Actions pending are, in substance, similar. I find as to plaintiffs and other Negro children similarly situated, these answers acknowledge the existence of racial segregation in the public schools of Delaware;[2] and this is a deprivation of rights guaranteed under the

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1. See Evans, et al. v. Members of the State Board of Education, et al. D. C. Del., 149 F. Supp. 376.

2. C. A. No. 1816: Complaint, pars. 3, 6, 7, 8; Answer, pars. 3, 6, 7, 8.
C. A. No. 1817: Complaint, pars. 8, 9, 10; Answer, pars. 8, 9, 10.
C. A. No. 1818: Complaint, pars. 3, 7, 8; Answer, pars. 3, 7, 8.
C. A. No. 1819: Complaint, pars. 3, 6, 7, 8; Answer, pars. 3, 6, 7, 8.
C. A. No. 1820: Complaint, pars. 3, 7, 8; Answer, pars. 3, 7, 8.
C. A. No. 1821: Complaint, pars. 3, 7, 8; Answer, pars. 3, 7, 8.
C. A. No. 1822: Complaint, pars. 3, 7, 8; Answer, pars. 3, 7, 8.

Federal Constitution and so declared inviolate by the Supreme Court.[3]

4. The State Board of Education adopted in the summer of 1954 regulations requiring the local school Boards to submit to the State Board plans for racial desegregation in the public schools. These regulations, especially as they affected the local Boards, had binding force throughout the State of Delaware.[4] This initiated a policy then regarded feasible. But, it is also manifest the local Boards, in Kent and Sussex Counties, in general, have not begun to comply with these regulations. The regulations of the State Board cannot be permitted to be wielded as an administrative weapon to produce interminable delay. In the interplay of forces resulting in continuing violation of plaintiffs' constitutional rights, these rights of Negro children must retain their vitality. They are, indeed, paramount.[5] The State Board, though not solely responsible for a solution of administrative procedures in this sociological-legal problem, must, in the final analysis, be held answerable.

5. The State Board of Education, from its past performance, blandly asserts it must await initial local action

3. Brown, et al. v. Board of Education of Topeka, et al., 347 U. S. 483, 349 U. S. 294.

4. 14 Del. Cde § 122; Steiner, et al. v. Simmons, et al., Del., 111 A. 2d 274, 580, 583 (per C. J. Southerland).

5. See Belton, et al. v. Gebhart, et al. and Bulah, et al. v. Gebhart, et al., 32 Del. Ch. 343, 87 A. 2d 862, aff'd in Del. Ch. 144, 91 A. 2d 137, cert. granted in 344 U. S. 891, Misc. Order in 345 U. S. 972, aff'd in 347 U. S. 483, Misc. Order in 348 U. S. 886, and aff'd and remanded in 349 U. S. 294.

At 87 A. 2d 864-865:

"Defendants say that the evidence shows that the State may not be 'ready' for non-segregated education, and that a social problem cannot be solved with legal force. Assuming the validity of the contention without for a minute conceding the sweeping factual assumption, nevertheless, the contention does not answer the fact that the Negro's mental health and therefore, his educational opportunities are adversely affected by State-imposed segregation in education. The application of Constitutional principles is often distasteful to some citizens, but this is one reason for Constitutional guarantees. The principles override transitory passions."

because the State Board "is not and can not be as conversant with local school problems as the local school Boards." The factual data contained in its Reports to the Governor of the State of Delaware refutes this. This Court readily understands the State Board, as to the problem of integration, is not as conversant with local problems as the local Boards, but the Court is in disagreement whether the State Board cannot be, or, when measured by its record of inaction in failing to negotiate a prompt and reasonable start toward full compliance, it has tried to be.

6. Clearly, it is best, in the abstract, to permit local conditions to be handled in the first instance by Local Boards for integration, as commanded by the Supreme Court of the United States. But, it is also recognized joint and not independent action is called for by all parties concerned. The first mandate of the Supreme Court fixed the law on this problem over three years ago, the second mandate, over two years ago. Since that time no appreciable steps have been taken[6] in the State of Delaware to effect full compliance with the law.

In conclusion, it is recognized, under the law as fixed by the Supreme Court of the United States, the right of plaintiffs to public education unmarred by racial segregation is immutable; that each state faces problems indigenous to its own circumstances; that circumstances in Delaware require racial desegregation to become a reality simultaneously throughout all communities; that the State Board exercises general control and supervision over all public schools in Delaware, including the Local Boards, and

6. The Delaware State Legislature has, by statute, provided the State Board of Education with broad powers of general control and supervision, including consultation with local Boards, Superintendents, and other officers, teachers and interested citizens, determination of educational policies, appointment of administrative assistants to administer its policies, requiring reports from Local Boards, the decision of all controversies involving administration of the school system, and the conducting of investigations relating to educational needs and conditions. 14 Del. Code § 121.

has knowledge of the status of racial desegregation in those schools; that the State Board's admissions of continued racial segregation in the public schools washes away all dispute as to this issue, as raised by the Local Boards; and, that any order by this Court directed to the State Board is, *a fortiori*, directed to any Local Board over which it, in turn, has authority.

It is hereby

ORDERED AND DECREED BY THIS COURT:

1. The motion of plaintiffs to consolidate the following causes, C. A. 1816 through C. A. 1822, inclusive, be and the same is hereby granted and all pending causes in this Court are hereby consolidated for judicial decision.

2. The plaintiffs' motions for summary judgment in C. A. 1816 through C. A. 1822, inclusive, as against the Members of the State Board of Education and the State Superintendent of Public Instruction be and the same are hereby granted.

3. The minor plaintiffs in the respective cases and all other Negro children similarly situated are entitled to admittance, enrollment and education, on a racially nondiscriminatory basis, in the public schools of Clayton School District No. 119, Milford Special School District, Greenwood School District No. 91, Milton School District No. 8, Laurel Special School District, Seaford Special School District and John M. Clayton School District No. 97, respectively, no later than the beginning of or sometime early in the Fall Term of 1957.

4. In accordance therewith defendants are permanently enjoined and restrained from refusing admission, on account of race, color or ancestry, of respective minor Negro plaintiffs and all other children similarly situated to the public schools maintained in the respective above-mentioned school districts.

5. To further obtain and effectuate admittance, enrollment and education of said minor plaintiffs and all other children similarly situated to the public schools maintained in the respective above-mentioned school districts, on a racially nondiscriminatory basis, defendant Members of the State Board of Education, having general control and supervision of the public schools of the State of Delaware and having the duty to maintain a uniform, equal and effective system of public schools throughout the State of Delaware, and defendant George R. Miller, Jr., State Superintendent of Public Instruction, shall submit to this Court within 60 days from the date of this order a plan of desegregation providing for the admittance, enrollment and education on a racially nondiscriminatory basis, for the Fall Term of 1957, of pupils in all public school districts of the State of Delaware which heretofore have not admitted pupils under a plan of desegregation approved by the State Board of Education.

6. 15 days prior to the submission of said plan to this Court, defendant Members of the State Board of Education, etc., shall send in writing by registered mail a copy of the plan of desegregation herein ordered to be submitted to this Court, together with a copy of this Order, to each member of the school board in all public school districts of the State of Delaware which heretofore have not admitted pupils under a plan of desegregation.

(s) PAUL LEAHY,
Chief Judge

At Wilmington,
July 15, 1957.

OPINION OF CHIEF JUDGE BIGGS IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IN BRENDA EVANS, ET AL. V. MEMBERS OF THE STATE BOARD OF EDUCATION, STATE SUPERINTENDENT, THE LOCAL BOARD OF CLAYTON SCHOOL DISTRICT, ET AL.

Civ. Actions Nos. 12,375—12,381

(Filed May 28, 1958)

By Biggs, *Chief Judge*.

The appeals at bar arise out of seven cases in the court below relating to the same subject matter and may be disposed of appropriately in one opinion. The jurisdiction of

the court below was invoked under Section 1331, federal question and jurisdictional amount, under Section 1343, Civil Rights, Title 28, U.S.C. and under Section 1983, Title 42, U.S.C., and under the Fourteenth Amendment to the Constitution of the United States. No issue as to jurisdiction is presented.

The histories of these litigations are set out in some detail in the opinions of the court below, referred to from time to time hereinafter, and need not be repeated here.[1] It is sufficient to state that following the decisions of the Supreme Court of the United States in Brown v. Board of Education and Topeka, 347 U.S. 483 (1954) and 349 U.S. 294 (1955), the Delaware State Board of Education requested the local school district boards to submit plans for the admission and education of Negro children into the public schools of the respective school districts on a racially non-discriminatory basis. There was prompt compliance by many school districts in Delaware but the local school district boards in Kent and Sussex Counties in general did not comply with the directions of the State Board of Education. Thereafter the minor plaintiffs, children residing within seven school districts, by guardians *ad litem*, brought the seven suits in the court below to compel compliance with the rulings of the Supreme Court of the United States in the Brown case.

All of the complaints allege that the minor plaintiffs are children resident within their respective school board districts and are entitled immediately to admission to the schools of their districts and would be accepted as students therein except for their race, color and ancestry. The seven suits are class actions brought on behalf of all children similarly situated to the minor plaintiffs, pursuant to Rule 23(a)(3) Fed. R. Civ. Proc., 28 U.S.C.[2]

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1 See also the opinion of the Supreme Court of Delaware in Steiner v. Simmons, — Del. —, 111 A. 2d 574 (1955).

2 "Rule 23 . . . (a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of

The defendants are members of the State Board of Education, the State Superintendent of Public Instruction and members of local school boards. The relief sought by the complaints was that the court below grant interlocutory and permanent injunctions declaring that the administrative orders, regulations and rules, practices or usages, pursuant to which the minor plaintiffs are segregated with respect to their schooling because of race, color or ancestry, violate the Fourteenth Amendment to the Constitution of the United States, and that the court below issue interlocutory and permanent injunctions requiring the defendants to admit the minor plaintiffs and all other children similarly situated to the public schools of their respective school districts on a racially non-discriminatory basis.

The appellants, who are members of the State Board of Education and the State Superintendent of Public Instruction, filed joint answers in all seven cases asserting that the power to effect desegregation lies not in them but in the local school boards. The members of the boards of education of the school districts also filed joint answers. These answers are substantially the same and, briefly put, assert that the local boards do not possess the power or jurisdiction under the school laws of Delaware, or the available facilities, to effect the admission of the minor plaintiffs or other children similarly situated to the respective schools on a racially non-discriminatory basis.

The members of the Board of Trustees of Clayton School District No. 119, at C.A. No. 1816 in the court below, No. 12,375 in this court, answered also that they were "improper parties" to the action. The court below correctly held this contention invalid. 149 F. Supp. 376 (D.C.Del. 1957).

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all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

"(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

In respect to the right of the plaintiffs to maintain a class action, see 145 F. Supp. 873 (D.C.Del. 1956).

On January 21, 1957 the plaintiffs in the case involving the Clayton School District mentioned immediately above filed a motion for summary judgment pursuant to Rule 56(a), Fed. R. Civ. Proc., 28 U.S.C.[3] After argument, the court below on March 6, 1957, filed an opinion, 149 F. Supp. 376, holding that the members of the Board of Trustees of Clayton School District No. 119 were making no reasonable start toward the admissions of the minor plaintiffs and those similarly situated on a racially non-discriminatory basis. Following this opinion, on April 1, 1957, the court entered a decree enjoining members of the Board of Trustees of the Clayton School District "in accordance with further order" from refusing admission to children on account of race, color or ancestry and requiring the members of the Board of Trustees of the Clayton School District to submit to the State Board of Education, within 30 days, a plan for the admittance to, and the enrollment and education in the public school maintained by the Board of the minor plaintiffs and all other children on a racially non-discriminatory basis, and also requiring the members of the State Board of Education within 60 days to file a plan so providing with the court below.

An appeal from this decree was taken to this court but was not prosecuted and accordingly the record was returned to the court below. The decree of April 1, 1957 is presently outstanding. No other similar decree addressed to members of the local school boards was entered in the other six cases but it is in this respect only that the case involving Clayton School District No. 119 differs in substance from the other six cases involving the other local school boards. However, in view of the fact that the operation of the decree in the Clayton case was made contingent on a further order of the

3. Rule 56(a) is as follows: "For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or, without supporting affidavits for a summary judgment in his favor upon all or any part thereof."

court below we are justified in treating and will treat this case as *in pari passu* with the other six cases.

On June 21, 1957, the plaintiffs in six of the seven cases, the case at No. 1816 in the court below involving Clayton School District No. 119 being excluded, moved for summary judgment against the members of the State Board of Education and the State Superintendent of Public Instruction. It should be noted that the defendants who are members of the local school boards were not included in these motions. On June 25, 1957, the plaintiffs in the six cases last referred to, the case at No. 1816 in the court below being excluded, moved to consolidate the six cases.

On July 25, 1957, the court below handed down an opinion, 152 F. Supp. 886, granting the motion to consolidate the six cases and the motions for summary judgment against the members of the State Board of Education and the State Superintendent of Public Instruction. The court below went further, however, and, apparently *sua sponte*, since no applicable like motions had been filed for summary judgment and for consolidation in respect to the suit at No. 1816 in the court below involving the Clayton School District No. 119, also granted summary judgment in that case against the members of the State Board of Education and the State Superintendent of Public Instruction and consolidated that case with the other six actions. The decree of the court below was an appropriate and proper one, and furnishes us with an additional reason for treating the appeal involving the Clayton School District No. 119 on a parity with the other six cases. The decree entered in all seven cases by the court below requires that the minor plaintiffs in all seven cases and children similarly situated should be admitted to their respective school districts on a racially non-discriminatory basis by the Autumn term 1957 and enjoins the designated defendants from refusing admission to these children. It also directs the State Board of Education and the Superintendent of Public Instruction to submit a plan to the court for the admittance, enrollment

and education of the children on a racially non-discriminatory basis within 60 days and to serve copies of the plan upon the members of the local school boards involved within 45 days.[4] The appeals at bar, taken by the members of the State Board of Education and the Superintendent of Public Instruction, followed.

The State Superintendent of Public Instruction and the members of the State Board of Education assert that the exercise of two powers are essential for planning and

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4 The order of the court is as follows:

"1. The motion of plaintiffs to consolidate the following causes, C. A. 1816 through C. A. 1822, inclusive, be and the same is hereby granted and all pending causes in this Court are hereby consolidated for judicial decision.

"2. The plaintiffs' motions for summary judgment in C. A. 1816 through C. A. 1822, inclusive, as against the Members of the State Board of Education and the State Superintendent of Public Instruction be and the same are hereby granted.

"3. The minor plaintiffs in the respective cases and all other Negro children similarly situated are entitled to admittance, enrollment and education, on a racially nondiscriminatory basis, in the public schools of Clayton School District No. 119, Milford Special School District, Greenwood School District No. 91, Milton School District No. 8, Laurel Special School District, Seaford Special School District and John M. Clayton School District No. 97, respectively, no later than the beginning of or sometime early in the Fall Term of 1957.

"4. In accordance therewith, defendants are permanently enjoined and restrained from refusing admission, on account of race, color or ancestry, of respective minor Negro plaintiffs and all other children similarly situated to the public schools maintained in the respective above-mentioned school districts.

"5. To further obtain and effectuate admittance, enrollment and education of said minor plaintiffs and all other children similarly situated to the public schools maintained in the respective above-mentioned school districts, on a racially nondiscriminatory basis, defendant Members of the State Board of Education, having general control and supervision of the public schools of the State of Delaware and having the duty to maintain a uniform, equal and effective system of public schools throughout the State of Delaware, and defendant George R. Miller, Jr., State Superintendent of Public Instruction, shall submit to this Court within 60 days from the date of this order a plan of desegregation providing for the admittance, enrollment and education on a racially nondiscriminatory basis, for the Fall Term of 1957, of pupils in all public school districts of the State of Delaware which heretofore have not admitted pupils under a plan of desegregation approved by the State Board of Education.

"6. 15 days prior to the submission of said plan to this Court, defendant Members of the State Board of Education, etc., shall send in writing by registered mail a copy of the plan of desegregation herein ordered to be submitted to this Court, together with a copy of this Order, to each member of the school board in all public school districts of the State of Delaware which heretofore have not admitted pupils under a plan of desegregation."

effecting desegregation. They argue that to admit the children involved to the respective public schools involved, authority must be exercised to admit individual students to one school rather than to another and that to educate students it is necessary to possess the authority to employ and assign teachers and principals to the various schools. They assert also that the powers necessary to effect these results are vested by the pertinent Delaware statutes solely in the local district school boards. They point to the provisions of 14 Del. C., Sections 741, 944, 976, 1401 and 1410, which variously provide for the employment of teachers and principals of schools, for the fixing of their salaries and for the termination of their employment.

The appellants point also to 14 Del. C., Sections 902 and 941, providing for the establishment of Boards of Education in the local school districts[5] and specifying the duties of these boards, included among which is the determining of policies in relation to the maintaining of separate schools for white and colored children, and the settling of disputes and for properly administering the public schools of the districts. The appellants also assert that they are without the authority to impose a plan for desegregation on the boards of education of the respective school districts because the members of these boards in Kent and Sussex Counties are elected by the voters of the school districts, 14 Del. C., Section 305, and that therefore they are without authority to appoint or remove these elected representatives or to control their actions in any way. In short, the appellants contend that they are without power effectively to carry out the court's decree.

Some of the local or district school boards, employing those of Milford, Seaford, Laurel and Greenwood as examples, contend primarily that the State Board of Education possesses the power to determine the operation of the public schools and that the State Board has the authority to

5 It should be noted that Section 301, 14 Del. C., defines a "district" as meaning a "School District or a Special School District or both."

adopt rules and regulations for the administration of the public school system of Delaware and that these shall be binding throughout the State. 14 Del. C., Section 122. They assert also that the school laws of Delaware put the burden on the Board of Education and the State Superintendent of Public Instruction to maintain a "uniform, equal and effective" educational system in Delaware. 14 Del. C., Section 141. The plaintiffs make similar contentions but they also assert that the Supreme Court of Delaware in Steiner v. Simmons, — Del. —, 111 A. 2d 547 (1955), held that the State Board of Education has the power to regulate the public schools of Delaware, relying *inter alia* on 14 Del. C., Sections 101(a), 121 and 122. These statutory provisions place certain supervisory powers over the whole of the Delaware School system in the State Board of Education. While the parties to these suits make other and further contentions these need not be discussed in this opinion. It should be noted, however, that we have considered them.

In determining the issues presented it is necessary to start with the guiding principles enunciated by the Supreme Court in its opinions in United States v. Board of Education of Topeka, *supra*. First, the Supreme Court has ruled that the Fourteenth Amendment to the Constitution of the United States prohibits the segregation of children in public schools solely on the basis of race. Second, the Court has prohibited admission to the public schools on a basis of racial discrimination. Third, the Court has required United States District Courts to enter such decrees as are necessary and proper to admit children to public schools on a racially non-discriminatory basis "with all deliberate speed."

Among the statutory duties entrusted to the State Board of Education by the General Assembly of Delaware is that of maintaining a "uniform, equal and effective system of public schools throughout the State . . .", 14 Del. C., Section 141. While this section of the Delaware

Code also requires the State Board of Education, pursuant to Article 10, Section 2, of the Constitution of Delaware, to maintain separate systems for white and Negro children, these provisions fall in view of the decisions of the Supreme Court of the United States referred to for these decisions redefined the concept of equality in public education. But while the separate but equal provisions of the Delaware Constitution and laws have been stricken down, the statutory mandate to the State Board of Education continues to exist and requires that body to maintain a uniform, equal and effective public school system in the State of Delaware. To hold otherwise would be nullification.

The contention of the members of the State Board of Education that the mandates of that body have no force upon the local school boards and the persons who comprise them is erroneous. The time when the Delaware educational system was encompassed by a loose federation of "425 educational republics" has long since passed. 2 Reed, History of Delaware, 691. The centralized nature of the present Delaware public educational system and the powers and duties of the State Board of Education are demonstrated fully by statutes of Delaware dealing with education.[6] This contention of the members of the State Board of Education is really one to the effect that the individuals

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6 As follows: 14 Del. C., § 101(a). The State is vested with the "general administration and supervision of the free public schools and of the educational interests of the State."

14 Del. C. § 121. "The Board shall exercise general control and supervision over the public schools of the State, . . ."

14 Del. C. § 121(2). The State Board has the power to determine the educational policies of the State.

14 Del. C. § 121(7). The State Board shall decide "all controversies and disputes involving the administration of the public school system."

14 Del. C. § 121(10). The State Board shall have the duty of "causing . . . the provisions of this title to be carried into effect, so as to provide a uniform, equal and effective system of public schools throughout the State; . . . ."

14 Del. C. 141(a). "The Board shall maintain a uniform, equal and effective system of public schools throughout the State, and shall cause the provisions of this title, the by-laws and regulations and the policies of the Board to be carried into effect."

comprising the local school boards will not obey the law. We will not make such an assumption.

We point out again that 14 Del. C., Section 122, gives the State Board of Education the power to "adopt rules and regulations for the administration of the free public school system which, when prescribed and published, shall be binding throughout the State." As if to re-emphasize the paramountcy of the State Board of Education's function in developing and maintaining a uniform school system throughout the State, Section 941, 14 Del. C., in specifying the duties and powers of the local school boards of the respective school districts, states the members of these bodies shall perform their duties and exercise their powers "subject to the provisions of . . . [Title 14] and in accordance with the rules and regulations of the State Board of Education." In view of the foregoing we cannot doubt but that the State Board of Education was designed as and is the central administrative force in Delaware's system of public education and is not a mere powerless reviewer of actions taken by local school boards. Our ruling as to the effect of the school laws of Delaware in this respect is confirmed by the opinion of the Supreme Court of Delaware by Mr. Chief Justice Southerland in Steiner v. Simmons, *supra*, — Del. at p. —, 111 A. 2d at p. 580, wherein it is stated: "By the school laws of the State, it [the State Board of Education] is vested with general policy-making power, and with authority to adopt rules and regulations for the administration of the public school system."

Accordingly we perceive no merit in the contention of the State Board of Public Education and of the State Superintendent of Public Instruction that the failure of the court below to subject the members of the local school boards to the injunction of July 15, 1957 places or leaves the members of the State Board of Education and the State Superintendent of Public Instruction in such a position that they stand in danger of contempt proceedings in the court below. The appellants say that they are in a position of

danger because the mandate imposed upon them by the order of the court cannot be carried out by them in view of the uncooperative attitude of members of the local school boards. The appellants assert legal impotency to carry out the decree of the court unless the members of the local school boards be made subject to the injunction. If a specific order of the court below be required to compel the members of the local school boards to perform their duties under the school laws of Delaware, we may assume that the court below will enter an appropriate decree against them at an appropriate future time and also will have due regard for the actions taken by members of the State Board of Education and by the State Superintendent of Public Instruction to create a racially non-discriminatory school system in Delaware. We reiterate that we will not assume that the members of the local school boards, also named as defendants in the instant litigations, will not adhere to rules and regulations of the State Board of Education as to the non-discriminatory racial practices if such rules and regulations are created and promulgated by the State Board of Education.

Moreover, an analysis of the decree appealed from demonstrates that the members of the State Board of Education and the State Superintendent of Public Instruction are not required to guarantee the accomplishment of desegregation in the Delaware school system but are enjoined from refusing admission to the minor plaintiffs and other children similarly situated to the schools of their respective school districts on account of race, color or ancestry. In short, the decree of the court below was designed to relieve the appellants of passivity and to compel them to go forward with the desegregation of the Delaware schools. The first step to be taken by the State Board of Education, with the aid of the State Superintendent of Public Instruction, is to submit a plan designed to effect the principles enunciated in the decisions of the Supreme Court

in Brown v. Board of Education of Topeka, *supra*, as ordered by the court below.

The members of the State Board of Education and the State Superintendent of Public Instruction may not delay further in the formulation and submission of such a plan. They must prepare and submit it promptly. The time for hesitation is past and the time for definitive action has arrived. The law as enunciated by the Supreme Court of the United States must be obeyed by all of us. If we do otherwise we will destroy our present form of constitutional government.

The decree of the court below stated dates in 1957 by which such a plan should have been submitted by the State Board of Education. Those dates are, of course, presently inoperative. New dates must be set. This is a matter which must be left to the discretion of the trial court. Those portions of the decree stating dates for the submission of the plan by the State Board of Education to the court below and to each member of all of the school boards in all of the public school districts which heretofore have not admitted pupils under a racially non-discriminatory plan, will be vacated so that the court below will be free to take appropriate action. The decree in all other respects will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.